IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 655 of 1991

Shri Kashiraya @ Kashinath
Bhimanna Birajdar ... Appellant
(Orig.plaintiff)

V/s

1. Shri Apparayya Shidlingappa Handral
2. Smt.Hirabai Sharnappa Shelke
since deceased by her heirs:
2A Ramanna Sharnappa Shelke ..Respondent
(Orig.defendants)

Shri V.B.Rajure for Appellant
Ms A.R.S.Baxi for Respondent nos 1 and 2A

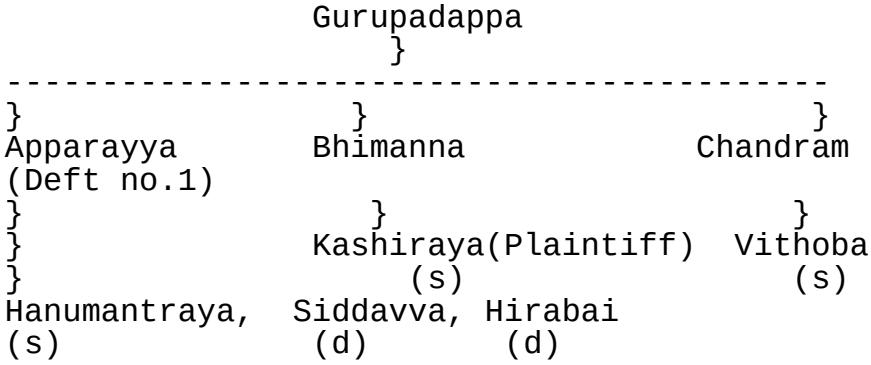
CORAM:S.R.SATHE,J.
DATED:19th August 2004

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the Court of 7th additional District

Judge, Solapur in Civil Appeal No.226 of 1985, whereby the judgment and order passed by the Civil Judge, J.D., Akkalkot in Regular Civil Suit NO.88 of 1982 dismissing the plaintiff's suit for partition was confirmed and the appeal was dismissed the original plaintiff has filed this second appeal. For the sake of convenience hereinafter the parties shall be referred to as the plaintiff and defendants.

2. It would be worthwhile to see the genealogy that can be spelt from the pleadings of the parties,



The suit land bearing Gat NO.190 situated at village Bhosge, Taluka Akkalkot was the ancestral property of plaintiff and defendants. The partition of the joint family property took place long back in the year 1937 and old Survey No.119 was divided into two Hissas viz. S.No.119/1 and S.No.119/2 and S.No.119/1 was allotted to third son, deceased Chandra and survey no.119/2

admeasuring 12 acres and 39 gunthas was kept common between first son Apparaya and second son deceased Bhimanna. After consolidation, Gat NO.190 was given to land bearing S.No.119/2. When defendant no.1 started obstructing joint cultivation, the plaintiff filed a suit for partition and separate possession of his half share.

3. The defendant filed his written statement and admitted the relationship between the parties, however, contended that three brothers viz. Apparayya, Bhimanna and Chandram and their sisters had already partitioned the joint family property in the year 1937 in which original Survey NO.119 was divided into Hissa no.119/1 and 119/2. He also further contended that Hissa No.119/1 was allotted to third son i.e. deceased Chandram and other Gat NO.190 was allotted to son of Apparayya. He therefore contended that the suit land was not kept common between son of deceased Apparayya and second son of deceased Bhimanna. He therefore, contended that plaintiff is not entitled to get partition and separate possession as prayed. On these pleadings the learned trial Judge framed issues and after considering evidence adduced by both the parties the trial Court held that the

plaintiff has failed to prove that he was having half share in the suit property. As against this defendant had in fact shown that Survey No.119/2 was allotted to share of Apparayya in partition. Naturally, the lower Court dismissed the plaintiff's suit.

4. Being aggrieved by the same the original plaintiff filed first Appeal. However, the same came to be dismissed. Hence second appeal has been preferred by him.

5. From the perusal of the record, it appears that at the time of admission, this Court has observed that ground nos.2 and 3 mentioned below are substantial questions of law, viz.

1) The substantial question of law involved in this Second Appeal is whether the suit land was kept common between the plaintiff's father Bhimanna and first son Apparaya and therefore, was liable for partition being the ancestral property.

2) The another question of law is whether the courts below have properly considered the pleadings of the parties.

6. In this appeal before me, Shri Rajure, learned Advocate for the Appellant plaintiff submitted that first appellate Court has erred in holding that defendant has succeeded in proving that the suit land was already partitioned in the year 1937 and as such there was no question of plaintiff getting share in the suit land. From the perusal of record, it appears that there was abundant evidence on record to indicate that joint family of plaintiff and defendants was having several ancestral lands and all these lands were partitioned in the year 1937. Not only that but even the house property which the joint family was having, was also partitioned. It is needless to say that when the partition at particular point of time is admitted then if it is case of co sharer that particular property was not partitioned then the burden lies on him to adduce cogent evidence to show accordingly. However, in the instant case from perusal of the judgments of both the Courts below it appear that the plaintiff has totally failed to adduce any such evidence to show that suit land was kept common. On the contrary, the evidence indicates that the land bearing Survey No.119/1 was allotted to the share of Chandram and

Survey no.119/2 was allotted to Apparayya. The trial Court as well as the first appellate Court have elaborately discussed as to how the said partition took place and how it indicated that land in question was not at all kept common. Thus there is in fact no substantial question of law involved in the matter. The question whether the land bearing gat No.119 was kept common or not was purely a question of fact. This being the case I think that there is no necessity to interfere with the concurrent findings recorded by the courts below. Hence the Second Appeal is dismissed with costs.

(S.R.SATHE,J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEALNO. 379 of 1992

Shri Chandrakant Pandurang Darshane
and Ors. ...Appellants

V/s

Sou.Sundarabai Amrutrao Kalamkar
and Anr. ...Respodnents

Shri M.V.Sali for Appellants
Shri A.V.Anturkar for Respondents

CORAM:S.R.SATHE,J.

DATED:13th September 2004

P.C.:-

. Heard the learned Advocagtes for the parties.

. During the course of arguments Shri Anturkar, learned Advocate for the Respondents submitted that he is even ready to take out Civil Application to implead Sushilabai, Meenabai and Sandhya as parties to the present proceedings,

because otherwise if at all is held that they are necessary parties in the instant matter,the suit is likely to be dismissed. The learned Advocate for the Appellant also fairly submitted that he has no objection even if such application is made and they are impleaded in the present Second Appeal.

. The learned Advocate for the Respondent submits that the said Civil Application be allowed in view of the fact that this Second appeal is of the year 1992 and 12 years have already lapsed in this Court, hence in stead of dismissing the suit at this stage or to go for second round of litigation, it is better to thrash out the entire matter in this S.A. hence it is adjourned till 23rd September 2004 so as to enable the Respondent to file Civil Application.

. The Matter is adjourned to 23-9-2004.

. S.A. is to be treated as part heard.